

In The
Supreme Court of the United States

FU-CHIANG TSUI,

Petitioner,

v.

TSAI-YI YANG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the *Younger* abstention doctrine and the *Colorado River* abstention doctrine apply to international child abduction cases involving the Hague Convention on the Civil Aspects of International Child Abduction.
2. If the *Younger* abstention doctrine and the *Colorado River* abstention doctrine apply to international child abduction cases, then whether federal courts should abstain from conducting a Hague Convention proceeding when there is an ongoing state custody proceeding with which the federal proceeding will interfere.

PARTIES TO THE PROCEEDINGS

Petitioner, Fu-Chiang Tsui, was the respondent-appellee below and is referred to as "Petitioner" herein. Respondent, Tsai-Yi Yang, was the petitioner-appellant below and is referred to as "Respondent."

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Honorable Court that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Third Circuit (referred to as the "Third Circuit Court of Appeals" herein) published at 2005 U.S. App. LEXIS 15943.

CITATIONS TO OPINIONS BELOW

The original Opinion of the Third Circuit Court of Appeals is annexed hereto and reported at 2005 U.S. App. LEXIS 15943 (App. 1a). The Third Circuit Court of Appeals reversed the Order of Court of the U.S. District Court for the Western District of Pennsylvania entered on November 19, 2003, which dismissed Respondent's Petition for Return of Child and denied the Motion for Stay (App. 16a). Petitioner filed a Petition for Rehearing on August 17, 2005. On August 31, 2005, the Third Circuit Court of Appeals denied said Petition (App. 21a).

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The Third Circuit Court of Appeals issued its original Opinion and Judgment on August 3, 2005. Following Petitioner's timely Petition for Rehearing, the Third Circuit Court of Appeals denied said Petition on August 31, 2005. This Petition for Writ of Certiorari is timely filed within ninety days of the denial of the Petition for Rehearing. Jurisdiction is invoked under 28 U.S.C.S. § 1254(1).

TREATIES AND STATUTES INVOLVED

The treaties and statutes involved in this case are annexed hereto (App. 23a).

CONCISE STATEMENT OF THE CASE

Petitioner and Respondent are the biological parents of Raeann (referred to as "Daughter" or "Child" herein). The Child was born on June 11, 1996 in Pittsburgh, Pennsylvania, United States. The Child is a citizen of the United States.

Subsequently, Respondent relocated with the Child (without Petitioner) to Taiwan and then to Canada. Later Respondent developed a disabling disease called Thymoma; she was also diagnosed with Myasthenia Gravis. In the Fall of 2002, Respondent's condition became nearly fatal.

Knowing she might die, Respondent asked Petitioner to take care of the Child. No child custody court order existed at the time. With Respondent's consent, the Child started living with Petitioner and his family in Pittsburgh, Pennsylvania, United States, on or around October 25, 2002.

As no child custody order existed, Petitioner initiated a custody action in the Court of Common Pleas of Allegheny County, Pennsylvania, United States (referred to as the "State Court" herein), on December 11, 2002. Respondent ignored this child custody proceeding. The State Court issued an Interim Order of Court on February 6, 2003, granting Petitioner

full custody of the Child and reserving Respondent's right to reinstate custody proceedings once she regained her health and desired to pursue custody (App. 20a). Meanwhile, after Petitioner had commenced a child custody action in Pennsylvania and after Respondent refused to participate, Respondent filed for custody in Canada. Respondent then acquired a similar court order from the Supreme Court of British Columbia, Canada, granting her interim custody of the Child (App. 18a). Respondent misled the Canadian court by informing said court that custody proceedings were not pending elsewhere.

Using the above Canadian custody order, Respondent sought return of the Child to Canada, by filing in a U.S. federal district court. Specifically, she filed a Petition for Return of Child to Petitioner (referred to as a "Hague petition" herein) in the United States District Court for the Western District of Pennsylvania (referred to as the "District Court" herein). Her argument was that Petitioner was violating an international treaty by keeping the Child in the United States. Specifically, she argued that Petitioner violated the Hague Convention on the Civil Aspects of International Child Abduction (referred to as the "Hague Convention" herein). Respondent also filed a separate Request to Stay, asking the District Court to stay the custody proceedings pending in State Court in Pennsylvania. Said Petition for Return of Child was dismissed, and the Request to Stay was denied by an Order of the District Court of November 19, 2003 (App. 16a).

The District Court held that it lacked jurisdiction to decide this treaty issue, and deferred to the Pennsylvania State Court to decide it (where custody proceedings were pending).

Respondent appealed to the Third Circuit Court of Appeals, arguing that the District Court had jurisdiction to decide the treaty issue. The Third Circuit reversed the Order of the District Court, held that the District Court had jurisdiction, and instructed the latter to proceed on the merits of the treaty issue. (App. 1a). The Third Circuit Court of Appeals denied Petitioner's Petition for Rehearing (App. 21a)¹, and this Petition for Writ of Certiorari followed.

Since caring for the Child, Petitioner has helped eliminate the Child's skin ailment and improve her grades. The Child is living with her two half-brothers, and enjoys a much higher standard of living in Petitioner's care. Respondent has very regular phone contact with the Child, and continues to fight her serious cancer. Respondent still refuses to participate in custody proceedings in Pennsylvania State Court, so Petitioner's full custody remains unchanged.

¹ One basis for asking for rehearing was that 28 U.S.C.S. § 46(b) and (c) require a panel of three judges must hear and determine a case in the U.S. Court of Appeals. In the instant case, only two judges filed the Opinion as the third judge retired beforehand, which violates both the above statute and *Khanh v. United States*, 539 U.S. 69.

REASONS FOR GRANTING THE WRIT

This Petition should be granted primarily to resolve a clear and growing conflict, which exists among the Circuit Courts of Appeals in interpretation and application of this Court's *Younger* and *Colorado River* abstention doctrines to an international treaty, the Hague Convention on the Civil Aspects of International Child Abduction (and its implementing domestic legislation, the International Child Abduction Remedies Act). The treaty and its implementing legislation give jurisdiction to both federal and state courts to decide claims made under the treaty. The two abstention doctrines in some situations remove jurisdiction of the federal courts. Some Circuit Courts of Appeals ignore the abstention doctrines, whereas other Circuit Courts do not. The Circuit Courts of Appeals that do address the abstention doctrines then apply those doctrines inconsistently.

The issues before this Court are of exceptional importance to the judiciary and to the protection of children brought to the United States by one parent from a foreign country, for the following reasons:

1. The issues presented involve interpretation and application of the Hague Convention on the Civil Aspects of International Child Abduction, which is an international treaty ratified by fifty-five (55) countries, to which the United States is a signatory;

2. The issues presented involve interpretation and application of the United States federal legislation implementing the Hague Convention, i.e., the International Child Abduction Remedies Act (referred to as "ICARA" herein);
3. The issues presented involve interpretation and application of the federal abstention doctrines created by this Honorable Court to international child abduction cases; and
4. The issues presented are large in scale: the last statistics of the National Center for Missing and Exploited Children, U.S. Department of State, reveal that in 1999 alone approximately 203,900 children were victims of family abductions.²

As provided in the Preamble of the Hague Convention, it was created by the states-signatories in recognition that the interests of children are of paramount importance in matters relating to their custody; the desire to protect children internationally from the harmful effects of their wrongful removal or retention; and to establish procedures to ensure their prompt return to the states of their habitual residence, as well as to secure protection for rights of access.

² See NISMART-2, <http://www.missingkids.com>.

ICARA, the federal legislation implementing this significant treaty, warns that international abduction and retention of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem. 42 U.S.C.S. § 11601(3).

Due to the existing, clear conflict among the Circuit Courts of Appeals, the Hague Convention and ICARA continue to be inconsistently interpreted and applied throughout the United States. As a result, claims made by parents under this treaty and federal statute are litigated at length just on the issue of jurisdiction, i.e., whether a federal district court has jurisdiction to hear the treaty claim. The outcome on the merits of the treaty claim is significantly delayed, sometimes for years. Consequently, the primary goal of the Hague Convention and ICARA is far from being met---prompt return of abducted children. There is no reason why federal district courts should wonder whether they have jurisdiction. This Honorable Court could easily clarify this confusion by issuing a clear principle for all courts to follow. Moreover, the inconsistency of federal courts, which embarrasses our legal system, would also be eliminated.

To avoid perpetuation of this conflict in the future among the remaining Circuits, and to prevent the potential for great injustice and delay based on the existing conflict, Petitioner prays this Honorable Court to grant the Writ of Certiorari.

I. This Court Should Grant The Writ To Resolve The Conflict Among The Circuit Courts of Appeals And To Clarify Whether The *Younger* Abstention Doctrine And The *Colorado River* Abstention Doctrine Apply To International Child Abduction Cases Involving The Hague Convention On The Civil Aspects Of International Child Abduction.

Both the *Younger* abstention doctrine and the *Colorado River* abstention doctrine were created by this Honorable Court. *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). The clear underlying reason for these doctrines is preservation of state sovereignty in our federal system of government. State sovereignty is preserved by federal courts abstaining from exercising jurisdiction when there is an ongoing judicial proceeding in a state court. *Younger v. Harris*, 401 U.S. at 43-44.

Three Circuit Courts of Appeals apply the *Younger* and the *Colorado River* abstention doctrines to international child abduction cases. *Escaf v. Rodriguez*, 52 Fed. Appx. 207, 2002 U.S. App. LEXIS 25292 (4th Cir. 2002); *Holder v. Holder*, 305 F.3d 854, 2002 U.S. App. LEXIS 18336 (9th Cir. 2002); and the case at issue, *Tsai-Yi Yang v. Tsui*, 2005 U.S. App. LEXIS 15943 (3rd Cir. 2005).

In each of these cases, one parent brought his or her child(ren) to the United States from a foreign country. That parent then filed for custody in state court in the U.S. The left-behind parent in the foreign

country subsequently filed in federal district court, claiming that the parent taking the child violated the Hague treaty. Thus, the facts were parallel. The issue in each case was whether the federal district court had jurisdiction to decide the treaty issue or whether the treaty issue must be brought before the state court. Each court used the two abstention doctrines as applicable law in answering this question, as well as using the provisions of the treaty itself. These Circuit Courts used the two abstention doctrines presumably because the doctrines are existing law created by the U.S. Supreme Court.

However, at least three Circuit Courts of Appeals firmly believe that the *Younger* and the *Colorado River* abstention doctrines are simply not applicable to international child abduction cases. Hence a clear conflict exists among different Circuit Courts of Appeals.

The first Court of Appeals to start this trend was the Eighth Circuit in *Silverman v. Silverman*, 267 F.3d 788, 2001 U.S. App. LEXIS 21421 (8th Cir. 2001). In *Silverman*, a mother brought her children from Israel (the country of the children's habitual residence) to the United States on vacation and subsequently retained them in Minnesota, where she filed for custody in state court. While those custody proceedings were pending, the left-behind parent (father) filed a petition to return the children to Israel under the Hague Convention. He filed it in federal district court.

The mother moved for dismissal of said petition, based on the ongoing state custody litigation and

applying the *Younger* abstention doctrine. The mother implied that because ICARA gives federal and state courts concurrent, original jurisdiction over Hague Convention cases, the father can file his Hague petition in state court, where custody was pending. 42 U.S.C.S. § 11603(a). The federal district court abstained and dismissed father's Hague petition.

On appeal, the Eighth Circuit Court of Appeals stated that the *Younger* abstention doctrine was not applicable to Hague Convention cases, and remanded the case to the district court for further proceedings. The Eighth Circuit reasoned that federal courts have the power to dismiss or remand based on abstention principles only where the relief sought is equitable or otherwise discretionary. *Silverman v. Silverman*, at 792. The *Silverman* court further stated:

"The Hague Convention mandates that a court that receives a valid Hague petition must determine whether the child has, in fact, been wrongfully removed... In the absence of discretion with respect to relief, abstention principles do not permit an outright dismissal of a Hague petition." (Underline is added.) *Id.*

One year later, in *Bouvagnet v. Bouvagnet*, 2002 U.S. App. LEXIS 17661 (7th Cir. 2002), the Seventh Circuit Court of Appeals, independently from *Silverman*, reached a decision similar to *Silverman*. In *Bouvagnet*, a mother brought her children from France to the United States, where she subsequently retained them in Illinois. She filed for custody in state court. The left-behind father filed for return of the children

under the Hague Convention in federal district court, while the custody action was pending in state court. The district court abstained, implying that father is welcome to raise his Hague issue in state court, which has jurisdiction under 42 U.S.C.S. § 11603(a) and where custody was pending.

On appeal, the Seventh Circuit Court of Appeals reversed the district court's dismissal of father's Hague petition, and remanded the case to the district court for further proceedings. The *Bouvagnet* court held that "a hague petition simply does not implicate the *Younger* abstention doctrine." *Bouvagnet v. Bouvagnet*, at 20. In addition, the Seventh Circuit stated that the *Colorado River* abstention doctrine was not applicable either. *Bouvagnet*, 21-26. The court held at 26:

"...the primary duty of a district court is to exercise the jurisdiction that Congress has conferred upon it; there is a presumption against abstention." (Underline is added.)

Finally, this very year, in *Gaudin v. Remis*, 415 F.3d 1028, 2005 U.S. App. LEXIS 14441 (9th Cir. 2005), the Ninth Circuit Court of Appeals followed the Eighth Circuit's *Silverman v. Silverman*. In *Gaudin v. Remis*, a father removed the children from Canada to the United States and filed for custody in Hawaii Family Court. The mother filed her Hague petition in the federal district court, while that custody litigation was pending in state court. The district court denied mother's petition, and she appealed. The father requested that the Ninth Circuit dismiss mother's appeal under the *Younger* and the *Colorado River*

abstention doctrines. *Gaudin v. Remis*, at 1034. Applying *Silverman*, the Ninth Circuit denied father's motion and stated that the *Younger* and the *Colorado River* abstention doctrines were "equally inappropriate in the case of an ICARA petition." *Id.*

With all due respect to the Seventh, Eighth, and Ninth Circuits, Petitioner believes that, by denying application of the *Younger* and the *Colorado River* abstention doctrines to international child abduction cases, the above Circuits have created an unauthorized exception to the *Younger* and the *Colorado River* abstention doctrines.

Petitioner's reasoning is as follows. As indicated earlier, the above Circuits justify their decisions against applying the abstention doctrines by stating that the Hague Convention and ICARA themselves do not permit application of the *Younger* and *Colorado River* abstention doctrines. However, neither the Hague Convention, nor its implementing legislation, ICARA, in their language expressly prohibit application of these abstention doctrines to international child abduction cases. Furthermore, this Honorable Court certainly never expressed that international child abduction cases are an exception to said abstention doctrines. Both doctrines were created by this Honorable Court well before the Hague Convention of October 25, 1980 and ICARA. Therefore, the Seventh, Eighth, and Ninth Circuits cannot flatly disregard the *Younger* and *Colorado River* abstention doctrines in international child abduction cases. The preservation of state sovereignty in our

federal system should not be discarded just because a case involves international child abduction.

Regardless, however, of which way this growing conflict between the Circuit Courts of Appeals is resolved, a resolution is clearly necessary to create uniformity in federal court decisions across the United States and to avoid misinterpretation and misapplication of the Hague Convention and ICARA.

II. This Court Should Grant The Writ To Resolve The Conflict Among The Circuit Courts Of Appeals About Whether Federal Courts Should Abstain When There Is An Ongoing State Custody Proceeding.

As stated above, ICARA vests the courts of the states and the United States district courts with concurrent, original jurisdiction of actions arising under the Hague Convention. 42 U.S.C.S. § 11603(a).

ICARA further provides that a Hague petitioner may commence judicial proceedings under the Hague Convention for the return of a child in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed. 42 U.S.C.S. § 11603(b).

Finally, ICARA provides that the court in which the Hague issue is brought under 42 U.S.C.S. § 11603(b) shall decide the case in accordance with the Convention. 42 U.S.C.S. § 11603(d).

The Circuit Courts of Appeals are in conflict when applying the *Younger* and the *Colorado River* abstention doctrines to the above law in international child abduction cases. Three Circuit Courts of Appeals find that federal district courts should not abstain from exercising jurisdiction while custody proceedings are pending in a state court. *Escaf v. Rodriguez*, 52 Fed. Appx. 207, 2002 U.S. App. LEXIS 25292 (4th Cir. 2002); *Holder v. Holder*, 305 F.3d 834, 2002 U.S. App. LEXIS 18336 (9th Cir. 2002); and *Tsai-Yi Yang v. Tsui*, 2005 U.S. App. LEXIS 15943 (3rd Cir. 2005).

By contrast, two Circuit Courts of Appeals hold that a federal district court should abstain when custody proceedings are pending. *Copeland v. Copeland*, 1998 U.S. App. LEXIS 1670 (4th Cir. 1998); and *Grieve v. Tamerin*, 269 F.3d 149, 2001 U.S. App. LEXIS 22504 (2nd Cir. 2001).

Petitioner believes that the cases against abstention misapply the *Younger* and the *Colorado River* abstention doctrines. Petitioner believes that both abstention doctrines bar a federal district court from exercising jurisdiction over any Hague Convention case, where custody litigation is pending in a state court (including but not limited to the instant case). Petitioner's reasoning is as follows.

The test for each of the two abstention doctrines is clear. With respect to the *Younger* abstention doctrine, three requirements must be met for a federal district court to abstain from getting involved: (1) there must be an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the

federal proceeding will interfere; (2) the state proceedings must implicate important state interests; and (3) the state proceedings must afford an adequate opportunity to raise the claims. *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (3rd Cir. 1996).

In the case at issue, it is undisputed that there is an ongoing Pennsylvania custody proceeding, to which Respondent (the federal plaintiff) is a party. In her Hague petition, Respondent asked the District Court to stay said state custody proceeding, pursuant to Article 16 of the Hague Convention.

Article 16 of the Hague Convention states:

"After receiving notice of a wrongful removal or retention of a child..., the judicial ... authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice." (Underline is added).

Stay of a state proceeding is an obvious interference with said proceeding. Thus, the first prong of the *Younger* doctrine is met.

With respect to the second prong of the *Younger* doctrine, there is no doubt that custody is within.

Pennsylvania's domain. Child custody matters in Pennsylvania are determined by the Pennsylvania Divorce Code and by Pennsylvania state case law, not federal law. Child custody is consequently an important state interest. Prong two is met.

The third prong of the *Younger* doctrine also applies: Respondent is entitled to raise her Hague Convention claim in the state court, as ICARA gives state courts original jurisdiction over international child abduction cases. 42 U.S.C.S. § 11603(a).

Hence, the District Court in the instant case should have abstained from hearing the Hague Convention claim, thereby requiring a Pennsylvania state court to hear it, pursuant to the *Younger* abstention doctrine. Although the District Court agreed, the Third Circuit Court of Appeals disagreed. As this analysis will apply to every case where the Hague Convention claim is filed in federal district court and where a custody action is pending in state court, the *Younger* doctrine always bars a federal district court from getting involved.

The *Colorado River* abstention doctrine is a separate doctrine. If its test is met, a federal district court must abstain, no matter what the outcome is of the *Younger* doctrine test. The *Colorado River* test is a balancing test of the following factors: (1) there must be concurrent jurisdiction between state and federal courts; (2) state and federal proceedings should be parallel; (3) the assumption by either court of jurisdiction over property; (4) the inconvenience of the

federal forum; (5) the desire to avoid piecemeal litigation; (6) the order in which jurisdiction was obtained; and (7) the source of applicable law. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

In the case at issue, concurrent jurisdiction is provided by 42 U.S.C.S. § 11603(a). Thus, the first prong is met. Prong 2 is met, as a court handling the Hague Convention issue must make the ultimate decision about where the Child should live, which is one kind of custody-determination under the Hague Convention. The custody proceeding in Pennsylvania state court also requires custody determinations. Prongs 3 and 4 are neutral to the facts of the instant case, since there is no property at issue and both courts are in the same geographic area -downtown Pittsburgh, Pennsylvania. (If prong 3 applies to both property or persons, prong 3 favors a state court hearing the Hague Convention claim; Pennsylvania state court assumed jurisdiction over the Child previous to the filing in federal district court by Respondent.) Prong 5 favors the state court hearing the Hague Convention claim, as the state court was already familiar with the case and has jurisdiction to continue with custody proceedings no matter what outcome is reached on the Hague Convention claim. Prong 6 also favors the state court, as Pennsylvania state court exercised jurisdiction before the District Court was asked to do so. Prong 7 favors state court, as the Hague Convention and ICARA require a legal analysis by the court in which state custody courts frequently engage.

Thus, Petitioner believes that the *Colorado River* abstention doctrine bars a federal court from exercising jurisdiction over the instant case, contrary to the conclusion of the Third Circuit Court of Appeals. This doctrine will bar a federal district court in every case where child custody is pending in a state court.

Nevertheless, no matter which way the issue is resolved of federal court abstention given pending custody, a resolution is clearly necessary to avoid the growing conflict between the Circuit Courts of Appeals on this topic, to avoid inconsistency among federal courts, and to prevent misinterpretation and misapplication of the Hague Convention and ICARA.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4714

TSAI-YI YANG

Appellant

v.

FU-CHIANG TSUI

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 03-cv-01613)
District Judge: Honorable Thomas M. Hardiman

Argued September 30, 2004

[ENTERED: AUGUST 3, 2005]

Before: ROTH, BARRY, and CHERTOFF*,
Circuit Judges.

(Filed: August 3, 2005)

* Judge Chertoff heard oral argument in this case but resigned prior to the time the opinion was filed. The opinion is filed by a quorum of the panel. 28 U.S.C. § 46(d)

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OPINION OF THE COURT

ROTH, Circuit Judge:

Tsai-Yi Yang filed a Petition pursuant to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 (Hague Convention), and the International Child Abduction Remedies Act, 42 U.S.C. § 11601, et seq. (2004) (ICARA), its implementing statute, in the U.S. District Court for the Western District of Pennsylvania. Citing Younger v. Harris, 401 U.S. 37 (1971), the District Court abstained from consideration of the Petition and denied as moot Yang's motion to stay state court custody proceedings. Yang filed a timely appeal. For the reasons that follow, we will reverse the District Court's decision to abstain and will remand the case for proceedings consistent with this opinion.

I. Background

The undisputed facts are that Tsai-Yi Yang and Fu-Chiang Tsui are the mother and father, respectively, of a daughter. Yang is a resident of British Columbia, Canada, and Tsui is a resident of Pittsburgh, Pennsylvania. A dispute as to the custody of the child led each party to file for custody, resulting in an award of custody to Tsui in Pennsylvania and an award of custody to Yang in British Columbia. After unsuccessfully attempting to secure a voluntary return of the child, Yang filed this Petition with the District Court.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction pursuant to ICARA, 42 U.S.C. § 11603. At the time Yang's Petition was filed in the District Court, the child was located in Pittsburgh, Pennsylvania. We have appellate jurisdiction over the appeal from the District Court's final order pursuant to 28 U.S.C. § 1291.

We exercise plenary review over the legal determination of whether the requirements for Younger abstention have been met and, if so, we review the District Court's decision to abstain for abuse of discretion. O'Neill v. City of Phila., 32 F.3d 785, 790 (3d Cir. 1994). In reviewing the District Court's denial of the motion to stay, we exercise plenary review over the District Court's legal conclusions. Shire U.S. Inc. v. Barr Labs., Inc., 329 F.3d 348, 352 (3d Cir. 2003).

III. Discussion

A. The Hague Convention

The Hague Convention is a multilateral treaty on parental kidnapping to which the United States and Canada are signatories. The Hague Convention's goal is to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, Preamble, 19 I.L.M. 1501, 1501 (1980). Article 16 provides that "until it has been determined that the child is not to be returned under the Convention," the state to which the child has been removed "shall not decide on the merits of rights of custody." Hague Convention, art. 16, 19 I.L.M. at 1503. Article 17 provides that "[t]he sole fact that a decision relating to custody has been given in or is entitled to recognition in the [country to which the child has been taken] shall not be a ground for refusing to return a child under this Convention . . ." *Id.*, art. 17, 19 I.L.M. at 1503.

ICARA, 42 U.S.C. §§ 11601 *et seq.*, implements the Hague Convention in the United States. ICARA vests state and federal courts with concurrent jurisdiction over claims under the Convention. 42 U.S.C. § 11603(a). ICARA further provides "[t]he court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention." 42 U.S.C. § 11603(d).

B. Younger Abstention

Although the general rule is that the pendency of a state court proceeding is not a reason for a federal court to decline to exercise jurisdiction established by Congress, McClellan v. Carland, 217 U.S. 268, 281-82 (1910), an exception to that rule is Younger abstention. Younger, 401 U.S. 37 (1971), established a principle of abstention when federal adjudication would disrupt an ongoing state criminal proceeding. This principle has been extended to civil proceedings and state administrative proceedings. Moore v. Sims, 442 U.S. 415 (1979), Williams v. Red Bank Board of Education, 662 F.2d 1008, 1017 (3d Cir. 1981) (overruled on other grounds as recognized in Schall v. Joyce, 885 F.2d 101, 108 (3d Cir. 1989)). Three requirements must be met before Younger abstention is appropriate: (1) there must be an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere, (2) the state proceedings must implicate important state interests, and (3) the state proceedings must afford an adequate opportunity to raise the claims. FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 843 (3d Cir. 1996).¹

¹ We note that the Second, Seventh, and Ninth Circuit 1 Courts of Appeals have developed Younger criteria that vary from those in this Court. The Second Circuit has explicitly stated that it considers "whether the state action concerns the central sovereign functions of state government . . ." Philip Morris, Inc. v. Blumenthal, 123 F.3d 103, 106 (2d Cir. 1997). We do not undertake such a consideration. The Seventh and Ninth Circuits have held that the Younger doctrine applies only when "the federal plaintiff ha(s) engaged in conduct actually or arguably in violation of state law, thereby exposing himself to an enforcement proceeding in

The issue whether a District Court should abstain from a Hague Convention Petition when a state court custody proceeding is pending is an issue of first impression in this Court.² Courts in several other circuits, however, have previously addressed this issue. Although the federal courts applying abstention doctrines to Hague Convention Petitions have reached different results as to whether to exercise abstention, there is a pattern in their analyses. In a situation where there is a state court custody proceeding and a petition is filed in federal court under the Hague Convention, but the Hague Convention has not been raised, or raised but not litigated, in the state court, the federal court has generally found that abstention is not appropriate. See Gaudin v. Remis, No. 03-15687, 2005 WL 1661593 (9th Cir., July 18, 2005), Holder v. Holder, 305 F.3d 854 (9th Cir. 2002); Silverman v. Silverman, 267 F.3d 788 (8th Cir. 2001); Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); Hazbun Escaf v. Rodriguez, 191 F.

state court." Bouvagnet v. Bouvagnet, No 01-3928, 2002 U.S. App. LEXIS 17661 at *15 (7th Cir. July 26, 2002), (withdrawn 2002 U.S. App. LEXIS 17954) (internal quotations omitted). See also Green v. City of Tuscon, 255 F.3d 1086, 1093-94 (9th Cir. 2001) (en banc) (finding that Younger "ordinarily. . . although not always" applies when the state proceeding is an enforcement action against the federal plaintiff) (overruled in part on other grounds in Gilbertson v. Albright, 381 F.3d 965, 968-69 (9th Cir. 2004) (en banc)). We have no such restriction.

² There are cases in the Third Circuit in which a Hague Convention Petition has been adjudicated by a District Court, where a state proceeding is ongoing but where abstention was never raised. See, e.g., Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995), In re Application of Sasson v. Sasson, 327 F. Supp. 2d 489 (D.N.J. 2004).

Supp. 2d 685 (E.D.Va. 2002). But see Bouvagnet v. Bouvagnet, 2001 WL 1263497 (N.D.Ill. 2001).³

Where the Hague Convention Petition has been raised and litigated in the state court, abstention by the federal court has generally been found to be appropriate. See Copeland v. Copeland, 134 F.3d 362, 1998 WL 45445 (4th Cir. 1998) (table), Cerit v. Cerit, 188 F. Supp. 2d 1239 (D. Haw. 2002).

C. Application of Younger to the Instant Case

The first question in applying the Younger abstention doctrine to a Petition raising Hague Convention claims in federal court is whether the federal proceeding will interfere with an ongoing state proceeding. It is clear that if the state proceeding is one in which the petitioner has raised, litigated and been given a ruling on the Hague Convention claims, any subsequent ruling by the federal court on these same issues would constitute interference. It seems equally clear that, if the state court in a custody proceeding does not have a Hague Convention claim before it, an adjudication of such a claim by the federal court would not constitute interference.

³ The Seventh Circuit Court of Appeals issued an opinion in Bouvagnet, finding that abstention was not appropriate, but withdrew that opinion due to the parties settling out of court. Bouvagnet v. Bouvagnet, 45 Fed. Appx. 535 (7th Cir. 2002).

The difference in subject matter between a custody determination and an adjudication of a Hague Convention Petition is the reason for finding no interference if the Hague Convention issues have not been presented in state court. Custody litigation in state court revolves around findings regarding the best interest of the child, relying on the domestic relations law of the state court. An adjudication of a Hague Convention Petition focuses on findings of where the child was habitually located and whether one parent wrongfully removed or retained the child.⁴ Hague Convention, art. 3, 19 I.L.M. at 1501. These are distinct determinations and the statutory language of the Hague Convention and ICARA explicitly provides that these determinations do not need to be made by the same court, "[t]he Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. § 11601(b)(4).

The Hague Convention proceedings can in fact be held in either state or federal court. ICARA vests concurrent jurisdiction over Hague Convention

⁴ In addition, as Tsui argues, if one year has elapsed since a child was wrongfully removed or retained when a Petition is filed, a court must also determine whether the child is "settled in its new environment." Hague Convention, art. 12, 19 I.L.M. at 1502. However, Yang in this case is raising a claim for wrongful retention, not removal, which puts Yang's Petition inside the one year period (the Petition was filed on October 23, 2003 and, based on the letter of permission for the child to travel, the earliest possible date of retention is October 25, 2002 and the more logical date is December 11, 2002, when Tsui filed for custody). Thus, the "well-settled" determination would not be relevant in this case.

Petitions in both court systems. 42 U.S.C. § 11603(a). Thus, a state court custody proceeding can include consideration of a Hague Convention Petition. But the petitioner is free to choose between state or federal court. More significantly to the case before us, the Hague Convention provides that any state court custody litigation be stayed pending the outcome of the Hague Convention litigation. Hague Convention, art. 16, 19 I.L.M. at 1503. Although ICARA does not contain a similar express provision, the purpose of the Hague Convention is to provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed. Therefore, it is consistent with this purpose that it is the custody determination, not the Hague Convention Petition, that should be held in abeyance if proceedings are going forward in both state and federal courts.

In the instant case, however, the District Court ruled that it was the state court custody proceeding, not the Hague Convention Petition, that should go forward. In doing so, the court found that "the parties are engaged in ongoing judicial proceedings" and, thus, without further discussion, found that the first prong of Younger was satisfied. It appears that the District Court did not apply the full analysis of the first prong of Younger, whether a federal proceeding would interfere with those ongoing state proceedings, particularly in light of the language and purpose of the Hague Convention. The parties agree that Yang has not raised the Hague Convention in state court. In addition, the state court has entered an interim custody order in favor of Tsui but has held no hearings and made no findings with regard to the Hague

Convention. Thus, the District Court's adjudication of the Hague Convention Petition would have been consistent with the statutory provisions and would not have interfered with the state court proceedings. In fact, given that Yang has obtained an order of custody from the Canadian courts and Tsui has obtained a custody order from the Pennsylvania courts, it would seem appropriate to have a federal court adjudication, pursuant to the Hague Convention, of whether Canada or Pennsylvania is the habitual residence of the child and thus the location of the court which should properly decide the custody issue.

The second prong of Younger is that the state court proceedings must implicate important state interests. In analyzing this prong, the District Court found that "it is wellsettled that family law is an important state interest, and federal courts should defer to state primacy . . . not only out of comity but also because the state is often more expert than are [federal courts] at understanding the implications of each decision in its practiced field." (internal quotations omitted). Thus, without further discussion, the District Court found that the second prong of Younger was satisfied. Although the District Court is correct that domestic relations are traditionally the domain of state courts, the District Court neglected to consider that Yang's Petition was not one for custody, but rather one for return of a child under the Hague Convention and ICARA, which is a federal statutory matter. See Hazbun Escaf, 191 F. Supp. 2d at 693 (finding wrongful retention determination, as distinct from custody, is not an important state interest). It would make the Hague Convention and ICARA

meaningless if a federal court abstained in a Hague Convention Petition because child custody was being disputed in state court. ICARA explicitly provides the federal courts with jurisdiction to determine jurisdiction over custody disputes under the Hague Convention. If the District Court's analysis were to be accepted, ICARA would be a hollow statute.

The third prong of Younger is whether the state proceedings afford an adequate opportunity to raise federal claims. The District Court found that "because Congress gave state and federal courts concurrent original jurisdiction under [ICARA], Petitioner has had adequate opportunity to raise this Petition before the Court of Common Pleas." Yang chose, however, not to do so, and the language of ICARA does not require her to raise the Hague Convention issue in state court. Indeed, we conclude that it would not be appropriate to apply Younger abstention to deprive a petitioner of a specific grant of jurisdiction in federal court, which she has in fact elected to exercise.

D. Motion to Stay

As discussed above, the District Court erred in dismissing Yang's Petition because the requirements of abstention were not met.⁵ As a result, Yang's Petition

⁵ Although the District Court did not address Colorado River abstention, because some Hague Convention cases do address Colorado River abstention, because Tsui raised Colorado River abstention in his brief, and for reasons of judicial efficiency, it is useful to note those requirements here. The threshold question in this analysis is whether there is a parallel state proceeding. Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). Parallel

should have been considered by the District Court. Thus, the District Court's dismissal as moot of Yang's Motion to Stay was also in error.

IV. Conclusion

For the reasons discussed, above, abstention is not appropriate in the instant case because Yang has not raised her Hague Convention claim in state court, because a Hague Convention Petition and a custody determination are distinct issues, and because the statutory provisions of ICARA and the Hague Convention require a federal court to hear a Hague Convention Petition in this circumstance. Thus, the District Court's decision to abstain under Younger and dismissal of Yang's Motion to Stay were both in error.

Accordingly, the judgment is reversed and the case remanded to the District Court for consideration of Yang's Petition under the Hague Convention.

cases involve the same parties and "substantially identical" claims, raising "nearly identical allegations and issues." Timoney v. Upper Merion Twp., 66 Fed. Appx. 403, 405 (3d Cir. 2003). The analysis of parallel proceedings is very similar to the first prong of the Younger test and, as in the analysis under Younger, the claims being adjudicated and the issues being analyzed by the state and federal courts in this case would be different. Thus, Colorado River abstention is not appropriate here.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

TSAI-YI YANG,)	
)	
Petitioner,)	
vs.)	Civil Action No. 03-1613
)	
FU-CHIANG TSUI,)	
)	
Respondent.)	

[ENTERED: NOVEMBER 19, 2003]

MEMORANDUM OPINION

Tsai-Yi Yang ("Petitioner") petitions this Court for the return of her child from the child's father, Fu-Chiang Tsui ("Respondent"), under the International Child Abduction Remedies Act, 42 U.S.C. § 11601, *et seq.* and requests that the Court stay ongoing proceedings in the Allegheny County Court of Common Pleas Family Division, *Tsui v. Yang*, FD-02-010509-004. After careful consideration, this Court finds it improper to interfere with ongoing state court proceedings and will abstain from exercising jurisdiction on the Petition for Return of Child under the abstention doctrine, *see Younger v. Harris*, 401 U.S. 37 (1977); *Pennzoil v. Texaco*, 481 U.S. 1 (1987) (extending *Younger* doctrine to civil context). Furthermore, the Court will deny the Motion for Stay as moot and under the Anti-Injunction Act, 28 U.S.C. § 2283 (2003).

I. Petition for Return of Child

The *Younger* abstention doctrine prohibits federal courts from enjoining pending state court litigation when "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil*, 481 U.S. at 10. In order for a court to abstain under *Younger*, there must be (1) ongoing state judicial proceedings; (2) the state proceedings must implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims. *Anthony v. Council*, 316 F.3d 412, 418 (3d Cir. 2003).

First, Petitioner alleges - and the docket report from the Court of Common Pleas of Allegheny County confirms - that the parties are engaged in ongoing judicial proceedings.¹ Second, it is well-settled that family law is an important state interest, and federal courts should "defer to state primacy ... not only out of comity but also because the state is often far more expert than are [federal courts] at understanding the implications of each decision in its practiced field." *Nicholson v. Scoppetta*, 344 F.3d 154, 168 (2d Cir. 2003) citing *Moore v. Sims*, 442 U.S. 415 (1979). Finally, because Congress gave state and federal courts concurrent original jurisdiction under the International Child Abduction Remedies Act, 42 U.S.C. § 11603(a), Petitioner has had adequate opportunity to raise this Petition before the Court of Common Pleas. Therefore,

¹ On February 6, 2003, The Honorable Eugene F. Scanlon, Jr. entered an *interim* order granting custody to Respondent (emphasis added).

this Court will not disregard the comity between the Commonwealth of Pennsylvania and the United States by interfering with the proceedings in the Court of Common Pleas of Allegheny County. See *Liedel v. Juvenile Court of Madison County*, 891 F.2d 1542, 1546 (11th Cir. 1990) ("Under *Younger* and *Sims*, federal districts may not interfere with ongoing child custody proceedings").

II. Motion to Stay

Petitioner's Motion to Stay pending resolution of the above petition is denied as moot and under the Anti-Injunction Act.

The Anti-Injunction Act prohibits federal court from enjoining proceedings in a State court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (2003). These exceptions are to be construed narrowly. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 314 F.3d 99, 103 (3d Cir. 2002). Petitioner asks this Court for the type of injunctive relief which the Anti-Injunction Act plainly prohibits, and the Court finds none of the Act's narrow exceptions to apply to this case.

An appropriate order will follow.

Thomas M. Hardiman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TSAI-YI YANG,)	
)	
Petitioner,)	
vs.)	Civil Action No. 03-1613
)	
FU-CHIANG TSUI,)	
)	
Respondent.)	

[ENTERED: NOVEMBER 19, 2003]

ORDER OF COURT

AND NOW, this 19th day of November, 2003, it
is **HEREBY ORDERED** as follows:

1. Petitioner's Petition for Return of Child
(Document No. 2) is **DISMISSED**.
2. Plaintiff's Motion for Stay (Document No.
3) is **DENIED**.
3. The clerk is directed to mark this case as
CLOSED.

Thomas M. Hardiman
United States District Judge

cc:

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COURT NO. E030298
VANCOUVER REGISTRY

IN THE SUPREME COURT
OF BRITISH COLUMBIA

TSAI-YI YANG, otherwise known as
ELLY YANG

PLAINTIFF

FU-CHIANG TSUI, otherwise known as
RICH TSUI

DEFENDANT

[ENTERED: MARCH 25, 2003]

ORDER

BEFORE)	TUESDAY, THE 25 TH DAY
)	
MASTER BOLTON)	OF MARCH, 2003

UPON THE PLAINTIFF'S APPLICATION FOR INTERIM CUSTODY coming on before me at Vancouver, British Columbia, on the 6th day of February, 2003 and the 11th and 25th days of March, 2003 IN THE PRESENCE of ANDREW G. SANDILANDS, Esq., Counsel for the Plaintiff, and MARSHALL MATIAS, Esq., Counsel for the Defendant; AND UPON READING the pleadings and proceedings had and taken herein; AND UPON HEARING what was alleged by Counsel aforesaid:

THIS COURT ORDERS that the Plaintiff shall have interim custody of RAEANN TSUI born 11th day of June, 1996 at the City of Pittsburgh, State of Pennsylvania, one of the United States of America.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY
PENNSYLVANIA

FU-CHIANG TSUI,

FAMILY DIVISION

PETITIONER,

NO: FD02-010509-004

vs.

TSAI-YI YANG

RESPONDENT.

[ENTERED: FEBRUARY 6, 2003]

INTERIM
ORDER OF COURT

AND NOW, this 6th day of February, 2003, upon consideration of the foregoing Petition for Special Relief, it is hereby ORDERED, ADJUDGED, and DECREED that Custody of the minor child, Raeann Tsui, is confirmed with Plaintiff. Defendant may reinstate the Generations Program once she regains her health and desires custody rights of her child.

BY THE COURT:

_____.J.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4714

TSAI-YI YANG,
Appellant
vs.
FU-CHIANG TSUI,

Before: SCIRICA, Chief Judge, SLOVITER, ALITO,
ROTH, McKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH,
FISHER, VAN ANTWERPEN, Circuit Judges.

[ENTERED: AUGUST 31, 2005]

ORDER

The petition for rehearing en banc filed by the Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ JANE R. ROTH
Circuit Judge

Dated: August 31, 2005
tyw/cc: Walter A. Angelini, Esq.
Dean E. Collins, Esq.
Andrew D. Glasgow, Esq.

**INTERNATIONAL CHILD ABDUCTION
REMEDIES ACT (ICARA)**

42 U.S.C.S. § 11601. Findings and declarations

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

42 U.S.C.S. § 11603. Judicial remedies

(a) Jurisdiction of courts

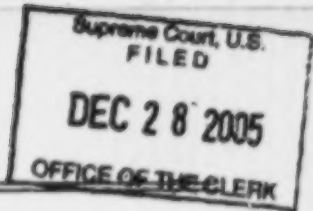
The courts of the states and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.



**In The
Supreme Court of the United States**

FU-CHAING TSUI,

Petitioner,

v.

TSIA-YI YANG,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the *Younger* and *Colorado River* abstention Doctrines apply in the Hague Convention Petitions brought in Federal District Courts, under circumstances where there is an ongoing state court action but where a Hague Convention petition is neither brought before the state action nor litigated in the state action? The Writ should be denied since there is no conflict among the several Appellate Circuits.
2. Should a decision denying the Petitioner's Writ be made with all deliberate speed when applying the Hague Convention treaty and *International Child Abduction Remedies Act* (ICARA), the United States implementing statute?

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<i>Younger v. Harris</i> , 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) (Younger Abstention Doctrine)	<i>passim</i>

MISCELLANEOUS

The Convention on the Civil Aspects of Child Abduction, done at the HAGUE on October 25, 1980, the "Hague Convention"	<i>passim</i>
International Child Abduction Remedies Act (ICARA) 42 U.S.C. § 11601 <i>et seq.</i>	<i>passim</i>

STATEMENT OF THE CASE

Your Respondent, TSIA-YI YANG, is a resident of British Columbia, (Canada).

The Petitioner, FU-CHIANG TSUI, is a resident of Pittsburgh, PA (United States).

The Respondent and Petitioner, although never married, have a daughter, RAEANN, born June 11, 1996, in Pittsburgh, PA and is also a citizen of the United States. Some time in December of 1996 Respondent and Raeann went back to her native Country of Taiwan, except for a brief return to the United States in the summer of 1997. Several years later Respondent and Raeann relocated to British Columbia, Canada.

While living in Canada, Respondent was diagnosed with Myasthenia Gravis and in September of 2002 was informed that she needed to undergo surgery for a removal of a tumor. Said surgery would necessitate a hospitalization of approximately seven to ten days, followed by a certain period of recovery, initially involving bed rest with her not being able to return to work for approximately two to three months after the surgery. This is contrary to the Petitioner's assertion that Respondent simply knew that she might die (see page 2 of Petitioner's writ). Considering having surgery, the Respondent called the father, the Petitioner (who had not seen his daughter since 1997 but had kept in contact via monthly telephone calls) and asked if he would be interested in having their daughter visit with him during her period of recovery from the surgery and that he agreed. Petitioner came to Canada on October 26, 2002, and after a short visit with the Respondent and Raeann, returned to Pittsburgh, PA on October 27, 2002 with the Respondent providing the Petitioner with a letter

of permission for the child to travel to the United States. The daughter, from 1997 to the permitted time of travel in October of 2002, had not been in the United States. Also, the visit was to be temporary, affording the Respondent a couple of months of convalescent time.

On December 11, 2002, Petitioner, filed for custody in the Pennsylvania State Court. Respondent did not respond to the complaint **nor did she raise the Hague Convention as an issue in the state action.**

On February 6, 2003, the Pennsylvania State Court issued an INTERIM order granting the father temporary custody pending further proceedings.

In late January of 2003 Respondent filed her own action in the Provincial Court of British Columbia, Canada, and it should be noted that Petitioner did appear through counsel and defended the action. In March of 2003, the Canadian court granted Respondent custody of Raeann.

All attempts to have Raeann voluntarily returned were frustrated and thereafter on or upon October 23, 2003, Respondent filed her original petition in the United States District Court for the Western District of Pennsylvania (Pittsburgh). Contrary to Petitioner's bold assertion that she used the Canadian custody Order as a basis for filing in the Federal District Court, she did no such thing. The petition was for the return of the Raeann consistent with and pursuant to the rules and regulations as set forth by *The Convention on the Civil Aspects of Child Abduction, done at the HAGUE on October 25, 1980*, the "Hague Convention" an international treaty which is implemented in the United States by the *International Child Abduction Remedies Act (ICARA) 42 U.S.C. 11601 et seq.* In conjunction with

her petition Respondent also filed a motion to stay the Pennsylvania state action, during the pendency of the Hague Convention petition.

The issue that the Federal Court was to resolve was whether the retention of Raeann by Petitioner was wrongful, and if so, unless barred by appropriate defenses enumerated within the Hague Convention, Raeann must be returned to Canada for further proceedings in the Canadian provincial Courts.

On November 20, 2003, the United States District Judge, *sue sponte*, entered an order dismissing Respondent's petition based upon the traditional Federal abstention doctrines.

Respondent thereafter in December of 2003, appealed to the Third Circuit Court of Appeals, arguing that the District Court should not have abstained and should have accepted jurisdiction and conducted a hearing on the merits.

Nine months later, in September of 2004 the Appellate Court heard oral arguments and then ten months later, in August of 2005 issued its opinion reversing the District Court and remanded the case to the district court for consideration of Respondent's petition under the Hague Convention.

The Appellate Court held that "abstention is not appropriate in the instant case because Yang has not raised her Hague Convention claim in state court, because a Hague Convention Petition and a custody determination are distinct issues, and because the statutory provisions of ICARA and the Hague Convention require a federal court to hear a Hague

Convention Petition in this circumstance. Thus, the District court's decision to abstain under *Younger* and dismissal of Yang's Motion to Stay were both in error."

REASONS FOR REFUSING THE WRIT

There is simply no conflict among the numerous Appellate Circuits that have visited the underlying issue of the instant matter.

When a Federal Circuit Court judge is faced with a decision of whether to hear a "Hague Convention" petition or defer to an ongoing state court proceeding involving the parties, the review of all Appellate Circuits that have visited this issue **SPEAK WITH ONE CLEAR AND COGENT VOICE** which is, that unless the "Hague Convention" petition has previously been brought and litigated in the state court proceeding, the Federal District Judge cannot abstain and must hear the Federal Petition.

All the Appellate Circuits, and specifically the Circuits identified by the Petitioner in his Writ, that have reviewed abstention via *Younger* or *Colorado River*, have unanimously concluded that the Abstention principles are simply not applicable in that when analyzing the cases using the *Younger* criteria, the *Younger* abstention tests simply fails. The unanimous result is that the Federal District court must rule on the federal plaintiff's Hague Convention petition. **THERE IS NO CONFLICT, NO IF AND OR BUTS.** The instant Petitioner's perception of "a clear and growing conflict" is simply illusory.

Additionally, the opinion of the Third Circuit Court of Appeals (the opinion which the Petitioner is appealing) is a straightforward and clear opinion. It reviewed all the

prior cases on the issue of *Younger* abstention issue set forth its precedent setting opinion, which is in line with all of the other Appellate Circuits that had visited the issue.

Furthermore, your Respondent agrees with Petitioners when he asserts correctly that "the treaty and its implementing legislation give jurisdiction to both federal and state courts to decide claims made under the treaty." (Petitioner's Writ page 5). Also, Respondent again agrees with Petitioner when Petitioner further states, that "the two abstention doctrines in some situations remove jurisdiction of the federal courts," because Respondent understands and appreciates that that is what the abstention doctrines do. However, the assertion by the Petitioner, that somehow, when the abstention doctrines are applied to a "Hague Convention petition" (except for the ONE LIMITED EXCEPTION noted above), the doctrines remove jurisdiction of the federal courts, is simply a bold illusion. In fact, the opposite is true, the Federal Courts DO NOT ABSTAIN, and do conduct a "Hague Convention" petition.

Additionally, Petitioners assertion in his preamble on Page 5 that "Some Circuit Court of Appeals ignore the abstention doctrines, whereas other Circuit courts do not." is simply meaningless. Circuit courts issue opinions then, if an appeal is filed, the Appellate Courts rule on the issue appealed. The equating of the two courts is simply, again, meaningless. If, on the other hand, the Petitioner is suggesting that there is truly a set of conflicting opinions among the several Appellate Circuits that reach opposite conclusions, then there may be merit to Petitioner's contention. However, that is simply not true. The Appellate Courts have been uniform in their holdings, having

spoken with a unanimous VOICE and are all contrary to Petitioner's assertions.

In all instances where a Federal District Court does abstain and removes the Federal "Hague Convention" plaintiff (except again as noted above) the District Court has been reversed by that Appellate Court. The only time that an abstention is appropriate, as recounted by the Appellate Courts, is when the Federal plaintiff, had in an underlying state court action, asserted and litigated a "Hague Convention Petition." Since the State Courts and Federal courts are granted concurrent jurisdiction the matter could be brought by the plaintiff in either forum. If the plaintiff originally brought his Hague Convention petition in the state forum and litigated the issues, why should the Federal court hear the matter. It should abstain, and it does.

Your Respondent absolutely agrees with the Petitioner when he sets forth and adopts the preamble of the HAGUE CONVENTION on page 6 of Petitioners writ and especially the underscoring of the need to "*establish procedures to ensure their (children's) prompt return to the states of their habitual residence . . .*," And as well as the ICARA (on page 7) warning that " . . . and only concerted cooperation pursuant to an international agreement can effectively combat this problem. 42 U.S.C. § 11601(3).

Moreover, your Respondent asserts that the United States Central Authority and its Canadian counterpart, the Canadian Central Authority are carefully watching this particular case. And as for the Petitioner's assertion that "Moreover, the inconsistency of federal courts, which embarrasses our legal system, would also be eliminated." (see page 7 of Petitioner's Writ), your Respondent would

simply say that there is no inconsistency. The rules are clear and cogent, although there is certainly some embarrassment when the legal system results in enormously frustrating the children's prompt return.

Again your Petitioner simply insists on suggesting a conflict among the several Appellate Circuits when in actuality there are none. On page 8 he states that there are three Appellate Circuits that apply *Younger*, that is, the Fourth, the Ninth and the Third Circuits (via this instant case). And then asserts that there is a conflict because there are other Circuits of Appeals that assert that the abstention doctrines are simply not applicable to international convention cases. Citing *Silverman* Eighth Circuit 2001, *Bouvagnet* Seventh, 2002 and *Gaudin*, Ninth Circuit, 2005.

These cases are all addressed by the Third Circuit Court of Appeals in arriving to it's correct holding.

But what is most distressing, again, implicating embarrassment and inordinate delay in the resolution of what is actually Respondent's very straight forward "Hague Convention" petition, is Petitioner's bold, inaccurate and misleading assertion in the second paragraph of page 14 of his petition when he asserts:

"BY CONTRAST, TWO CIRCUIT COURTS OF APPEALS HOLD THAT A FEDERAL DISTRICT COURT SHOULD ABSTAIN WHEN CUSTODY PROCEEDINGS ARE PENDING." (emphasis mine). Citing *Copeland* and *Grieve*. And thereafter goes into his argument (the very same argument proposed to the Third Circuit Court of Appeals in the instant case) as to why the *Younger* abstention should apply, leading to his inescapable conclusion

that it was proper for the district court below to have abstained.

Moreover, what is especially distressing is that the Petitioner boldly misstates the holdings of the cases especially in light of the fact that the Third Circuit Court of Appeals below did consider *COPELAND*, and further addressed *Cerit v. Cerit*, 188 F. Supp. 2d 1239 (D. Haw. 2002). *Copeland* was one of the two cases specifically referenced in the underlying opinion of the Third Circuit Court of Appeals. **The true and complete reference to the Petitioner's misstated quote is found in the Third Circuit's Appellate Opinion, referenced on page 7a of the Petitioner's appendix.**

Below is what the Third Circuit Court of Appeals actually said:

"Where the Hague Convention Petition has been raised and litigated in the state court, abstention by the federal court has generally been found to be appropriate." Citing *Copeland* and *Cerit*. *Copeland*, is one of the cases, cited in Petitioner's mistaken assertion. (emphasis mine).

Again, whether a state action is commenced is not the issue. The issue is simply whether or not the Federal plaintiff in the state action did raise and litigate a Hague Convention petition in the state action. Accordingly it is consistent with the *Copeland* and *Cerit* holdings.

But to throw *Grieve* into the mix is also nothing but another attempt to confuse the matters. Once *Grieve* is reviewed it becomes apparent that there were multiple actions, in state courts, federal courts and sometimes with or without an attorney. The Appellate Court's review of

Grieve concluded that the district court abstention had to be sustained not on account of the merits of the district courts ruling but on principle of collateral estoppel.

The Appellate Court reported, at page 154 as follows: *Grieve* at page 154 said:

... *Grieve* has provided no transcript of or citation to the alleged statement. Assuming it was said, however, the fact that the Southern District, in addition to making an erroneous ruling, also made an erroneous observation in colloquy does not relieve *Grieve* from his failure to appeal its ruling. If *Grieve* wished to [**12] contend that the district court was wrong, his remedy was to appeal. When he failed to do so, the Southern District's decision became final and, by operation of collateral estoppel, conclusive on the issue of Younger abstention in the Eastern District action also.

Clearly then, Respondent's contention when citing *Copeland* or *Grieve* is misleading and simply not accurate. Simply put, all Appellate Circuits that have addressed the issue of the Hague Convention Petition are on the same page, they all agree and provide a bright line for ALL CIRCUIT COURT JUDGES TO FOLLOW.

Accordingly, when presented with a federal plaintiff asserting a Hague Convention petition, the federal district court must not abstain and must accept and rule on the merits of the petition, unless the federal plaintiff had raised and litigated the matter an underlying state court action, wherein under those conditions, the federal court may appropriately abstain. Clear, cogent guidelines from all of the numerous and unanimous federal Appellate

Courts that have had to rule on the Petitioner's specific issue.

Accordingly, any suggestion of a conflict is simply illusory. There is no conflict whatsoever.

**RESPONDENT'S WRIT FOR REVIEW SHOULD
BE DENIED AND SAID REVIEW SHOULD BE
DECIDED WITH ALL DELIBERATE SPEED.**

Given the time frame set forth in the statement of the case it becomes abundantly apparent that this matter has lingered far too long. The child was wrongfully retained in the United States in the later part of 2002, and it is now the end of 2005 and the child is still in the United States and moreover, not even a hearing on the merits has been had.

Asserting the preamble of the Hague Convention wherein it states that, *inter alia*, underscoring of the need to "*establish procedures to ensure their (the children's) prompt return to the states of their habitual residence . . .*," certainly rings hollow when compared to the instant cases timeline.

Additionally, there is a hollow ring when further compared to Article 12 of ICARA, the United States implementing legislation of the Hague Convention which further states among other matters:

Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of

less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned **shall order the return of the child forthwith.** (emphasis mine).

It is noteworthy that the Third Circuit Court of Appeals has already given opinion on the Respondent in this matter (Ms. Yang) had in fact applied less than the one year requirement and yet after over 2 years since her original filing an initial hearing on the merits still eludes her.

CONCLUSION

It is clear that the Appellate Circuits are uniform in their holdings regarding the failure of the Federal abstention doctrines *vis-à-vis* the Hague Convention. A bright line has been set forth by the numerous Appellate Circuits that have visited this issue, and that any federal district court judge, situate in any district has had and continues to have ample case law upon which to render its decision relevant to the abstention issues.

Additionally, it is clear that PROMPT determinations are set forth in the underlying treaty and ICARA, and accordingly, your Respondent would request a prompt resolution denying the Petitioners writ, and awarding costs and fees for the defense of this matter to the Respondent, for the untenable arguments proposed by the Petitioner and for the filing of such a frivolous writ, your Respondent will ever pray.

Respectfully submitted on this 28th day of December,
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JAN 10 2006

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

**In The
Supreme Court of the United States**

FU-CHIANG TSUI

Petitioner,

v.

TSAI-YI YANG,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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RULE

Sup. Ct. R. 15.6.1

INTRODUCTION

Fu-Chiang Tsui (hereafter "Dr. Tsui" or "Petitioner") filed a Petition for Writ of Certiorari on November 29, 2005 (hereafter "Petition"). Tsai-Yi Yang (hereafter "Respondent") filed her Brief for Respondent in Opposition on or around December 28, 2005 (hereafter "Brief").

Respondent's objections to this Honorable Court accepting the instant case are without merit, as will be demonstrated below. Not only do Respondent's arguments contain offensive language, but they contain various errors: legal, factual, and grammatical. Respondent's angry tone should not serve as a distraction to the strong reasons for accepting this case.

The foregoing Reply Brief is filed pursuant to the Rules of the Supreme Court of the United States, Rule 15.6.

REASONS FOR GRANTING THE WRIT

- I. **This Court Should Resolve the Conflict Among The Circuit Courts Of Appeals About Whether The *Younger* Abstention Doctrine And The *Colorado River* Abstention Doctrine Should Even Be Looked At In International Child Abduction Cases.**

To summarize the conflict, the common fact pattern is that one parent removes a child from a foreign country and brings the child to the United

States, then filing for custody in a U.S. state court. While the custody action is pending in the state court, the left-behind parent files a Hague petition in a federal court, requesting that the child be returned to the foreign country. The issue becomes whether the federal court has jurisdiction to get involved with the Hague Convention issue.

Two doctrines in U.S. law mandate that a federal court cannot get involved when particular matters are pending in a state court.¹ Some Circuit Courts of Appeals have held that these two abstention doctrines should not be looked at whatsoever,² whereas other Circuit Courts of Appeals have held that the two doctrines should be looked into.³

In her Brief for Respondent in Opposition, Respondent argues that no conflict exists among the Circuit Courts of Appeals (see pg.7 of Brief). Nevertheless, the cases presented by Petitioner speak for themselves; Petitioner's quotations of the

¹ These doctrines are the *Younger* and the *Colorado River* abstention doctrines (*Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 [1976]).

² *Silverman v. Silverman*, 267 F.3d 788, 2001 U.S. App. LEXIS 21421 (8th Cir. 2001);, *Bouvagnet v. Bouvagnet*, 2002 U.S. App. LEXIS 17661 (7th Cir. 2002); and *Gaudin v. Remis*, 415 F.3d 1028, 2005 U.S. App. LEXIS 14441 (9th Cir. 2005).

³ *Escaf v. Rodriguez*, 52 Fed. Appx. 207, 2002 U.S. App. LEXIS 25292 (4th Cir. 2002); *Holder v. Holder*, 305 F.3d 854, 2002 U.S. App. LEXIS 18336 (9th Cir. 2002); and *Tsai-Yi Yang v. Tsui*, 2005 U.S. App. LEXIS 15943 (3rd Cir. 2005).

cases are unambiguous (see pgs. 10-12 of Petition). Thus, the conflict among the Circuit Courts of Appeals clearly exists.

Respondent, conveniently enough, fails to discuss any of Petitioner's cases in support of her position that the conflict is somehow illusory. Instead, Respondent simply references the Third Circuit Opinion in the instant case and states that the Third Circuit addressed this conflict in its Opinion.⁴

The Third Circuit's Opinion is not binding on any other Circuit Court of Appeals. It does not overturn the precedential decisions in the Circuit Courts of Appeals that took the opposite position, and it is not binding on the Circuit Courts of Appeals which have not yet reached precedential decisions. The Third Circuit's Opinion simply contributes to the existing conflict by taking a position on one side of this conflict.

The only court to resolve this conflict is this Honorable Court, whose decision is binding on all Circuit Courts of Appeals.

Respondent has failed to undermine the very good reason for accepting Dr. Tsui's Petition for Writ of Certiorari.

⁴ Although the Third Circuit cited the *Silverman*, *Bouvagnet*, and *Gaudin* cases, it never addressed and reconciled the existing split among the Circuit Courts of Appeals. In fact, the Third Circuit erred in its reasoning by relying on the above cases. Whereas the Third Circuit stands on one side of this split, these three cases stand on the other.

II. This Court Should Resolve The Second Conflict Among The Circuit Courts of Appeals About Whether Federal Courts Should Abstain After Applying The Abstention Doctrines.

The second reason for asking this Honorable Court to accept the instant case is to resolve an additional split among the Circuit Courts of Appeals. As indicated above, a group of Circuit Courts of Appeals look at the abstention doctrines in their analysis, whereas another group of circuits does not. With respect to the group that looks at the abstention doctrines, there is an additional split within that group. Some Circuit Courts of Appeals hold that the abstention doctrines require a federal court to abstain from getting involved,⁵ whereas other Circuit Courts of Appeals hold that the abstention doctrines permit federal court involvement.⁶

Respondent argues that "all Appellate Circuits that have visited this issue speak with one clear and cogent voice" (see pg.4 of Brief). That unanimous position is that a federal court cannot abstain, unless the Hague Petition was previously brought and litigated in the state court proceeding (Id.).

⁵ *Copeland v. Copeland*, 1998 U.S. App. LEXIS 1670 (4th Cir. 1998); and *Grieve v. Tamerin*, 269 F.3d 149, 2001 U.S. App. LEXIS 22504 (2nd Cir. 2001).

⁶ *Escaf v. Rodriguez*; *Holder v. Holder*; and *Tsai-Yi Yang v. Tsui*.

Nevertheless, Respondent's characterization is inaccurate. The Circuit Courts of Appeals are not unanimous in their position. The two cases, *Lops v. Lops*, 140 F.3d 927, 1998 U.S. App. LEXIS 9270 (11th Cir. 1998) and *Copeland*, clearly demonstrate this fact. These two circuit decisions originate out of two different Circuit Courts of Appeals in the same year. The *Lops* case is inconsistent with the *Copeland* case.

In *Lops*, a Hague petition was filed by the left-behind parent in the Superior Court of Columbia County, Georgia (i.e., a state court). *Lops v. Lops*, at 934. After a hearing, the state court judge issued an order transferring the case to the state of South Carolina. *Id.* After having a second hearing on the Hague claim, the Family Court in South Carolina scheduled a third hearing and granted temporary custody to one parent. *Id.* Before this third hearing occurred, the left-behind parent filed another Hague petition in federal court, which then conducted its own hearings on the Hague claim. *Id.*, at 935. The Eleventh Circuit affirmed that the federal district court properly got involved, despite the ongoing Hague litigation in state court.⁷

By contrast, the *Copeland* court reached the opposite position. In *Copeland*, the left-behind parent also raised a Hague petition claim in the state court. *Copeland v. Copeland*, at 4. She subsequently filed a Hague petition in federal court,

⁷ The Third Circuit erroneously cites *Lops* in support of its position (see Appendix at 6a), as *Lops* does not support the principle preceding the citation. In fact, it stands for the opposite principle.

while the Hague claim was still pending in the state court. *Id.* The federal court abstained from getting involved, because of the ongoing Hague litigation in the state court. *Id.*, at 5.

The *Lops* and *Copeland* courts, out of two different circuits, reached contradictory positions on the same facts. Hence, a uniform voice among the Circuit Courts of Appeals does not exist, as Respondent repeatedly asserts.^{8, 9, 10}

Even the Third Circuit in the instant case does not recognize a unanimous voice among the Circuit Courts of Appeals (see Appendix at 6a). The Third Circuit does assert that "In a situation where there is a state court custody proceeding and a petition is filed in federal court under the Hague

⁸ It should be noted that Respondent makes a number of characterizations about the Circuit Courts of Appeals without citing any cases in support of her position. The above characterization is a good example.

⁹ Respondent also asserts in bold lettering that Petitioner inaccurately quotes *Copeland* (see pg. 8 of Brief). However, Petitioner never quoted the *Copeland* case (see pg. 14 of Petition, the only reference to the *Copeland* case, where *Copeland* is cited, but is not quoted).

¹⁰ Respondent argues that Petitioner somehow misrepresented the holding of the *Grieve* case without adequately explaining the alleged misrepresentation (see pgs. 8-9 of Brief). The federal district court in the *Grieve* case abstained, after applying the *Younger* abstention doctrine. *Grieve v. Tamerin*, 2000 U.S. Dist. LEXIS 12210. The Second Circuit affirmed the district court decision, thereby making the district court decision conclusive. *Grieve v. Tamerin*, 69 F.3d 149, 2001 U.S. App. LEXIS 22504 (2nd Cir. 2001). Thus, Petitioner has not misrepresented the holding of the *Grieve* case.

Convention, but the Hague Convention has not been raised, or raised but not litigated, in the state court, the federal court has generally found that abstention is not appropriate." (Id.) The Third Circuit then *erroneously* cites seven cases in support of this alleged pattern (Id.). The majority of these cases do not support that principle.

The facts of the *Lops* case (one of those seven cases) do not fit this alleged pattern, as the federal court got involved even though the Hague petition was being litigated in the state court. This case is actually a counter-example to the alleged pattern. The cited *Gaudin*, *Silverman*, and *Bouvagnet v. Bouvagnet* (at the circuit level) decisions are not applicable, as these courts held that the abstention doctrines should not be looked at whatsoever in the analysis of whether the federal court should get involved. In *Bouvagnet v. Bouvagnet* (at the district level), 2001 U.S. Dist. LEXIS 17095 (District of Illinois, Eastern Division), the facts do not fit this alleged pattern, as the federal court abstained even though no Hague claim was raised in the state court; this case is another counter-example to the alleged pattern. Only two of these seven cases cited by the Third Circuit appear supportive of the principle preceding it.

Again, the various Circuit Courts of Appeals are not consistent. The clear and growing conflict is not "simply illusory," as Respondent boldly asserts (see pg. 4 of Brief). Petitioner has taken great care to be accurate in characterizing the positions of the various circuits. The conflict is real, and Petitioner is asking this Honorable Court to resolve it.

CONCLUSION

Respondent complains that she has not received a hearing on the merits of her Hague petition, despite filing it two years ago, and that the child has not been expeditiously ordered back to Canada.

First, Respondent could have had a hearing pursuant to her Hague petition two years ago, if she had filed her petition in Pennsylvania state court—the proper forum. Respondent also waited approximately one year before filing her Hague petition. It should also be emphasized that Respondent appealed the case to the Third Circuit, thereby causing additional delay.

Second, Respondent wrongly presumes that the child will be ordered back to Canada ultimately. The child should not be ordered to live in Canada, as Petitioner has not violated the Hague Convention. He has not wrongfully removed nor wrongfully retained the child in the United States.

Petitioner has put forth very strong reasons for this Honorable Court accepting this case, as explained more fully in Dr. Tsui's Petition for Writ of Certiorari. Said Petition is far from frivolous. Respondent has failed to rebut or otherwise undermine these strong reasons, as demonstrated above. Respondent states that the Central Authorities of the United States and Canada are closely watching the instant case (see pg. 6 of Brief). That attention only confirms the importance of this subject. Petitioner respectfully requests this

Honorable Court to accept this case, to resolve the serious splits among the Circuit Courts of Appeals throughout the United States.

Respectfully submitted,

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